

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1592

W.X.

vs.

S.W.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant appeals from an order issued on August 20, 2018, extending an abuse prevention order issued pursuant to G. L. c. 209A (209A order). He argues that the judge abused her discretion in extending the order by failing to consider the totality of the circumstances and concluding that there was sufficient evidence to support the order. We affirm.

Background. The parties were married for thirteen years and have two children together. On January 3, 2017, following two violent altercations in late December 2016, the plaintiff applied for and was granted an ex parte abuse prevention order against the defendant pursuant to G. L. c. 209A. The plaintiff filed for divorce shortly thereafter. On January 13, 2017, the judge approved a joint stipulation to extend the ex parte order by six months.

On July 31, 2017, after an evidentiary hearing, a different judge extended the 209A order for one year. That judge made findings, expressly credited portions of the plaintiff's testimony, and concluded that the defendant had "caused [the plaintiff] physical harm within the meaning of" c. 209A on both December 29 and 30, 2016. Specifically, the judge found that during the December 29 incident, the defendant pushed and shoved the plaintiff, and during the December 30 incident, the defendant slapped and choked her. There was evidence that the plaintiff suffered chest trauma and bruising as a result of the altercations. Additionally, the judge found that the defendant's demeanor in court could be "very excited" and "appear[ed] very aggressive even as he was testifying." The defendant did not appeal.

The parties' divorce was finalized on February 7, 2018, but as of August 2018, there were ongoing financial issues regarding the marital property and retirement issues, and the parties required assistance from a parent coordinator to facilitate issues regarding the children. In June 2018, the defendant sent the plaintiff an e-mail asking whether she had legal counsel for the upcoming 209A extension hearing. At an evidentiary hearing on an extension of the 209A order held in August 2018, the plaintiff testified that she perceived the e-mail as a "psychological threat." The plaintiff also testified that, in

addition to the June 2018 e-mail, she remained in fear of the plaintiff and felt she would need "to look behind [her] back all the time and to worry about [her] own safety at home and at work" should the 209A order not be extended. The judge extended the order for another year.

Discussion. We review an order extending an abuse prevention order issued pursuant to c. 209A "for an abuse of discretion or other error of law." E.C.O. v. Compton, 464 Mass. 558, 562 (2013). An abuse of discretion may be found where a judge clearly erred in her decision, such that the result is "outside the bounds of reasonable alternatives." Adoption of Mariano, 77 Mass. App. Ct. 656, 660 (2010). We give great deference to a trial judge's exercise of discretion when reviewing under this standard. L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014) ("it is plainly not an abuse of discretion simply because a reviewing court would have reached a different result").

"The standard for obtaining an extension of an abuse prevention order is the same as for an initial order -- 'most commonly, the plaintiff will need to show a reasonable fear of imminent serious physical harm at the time that relief is sought.'" MacDonald v. Caruso, 467 Mass. 382, 386 (2014), quoting Iamele v. Asselin, 444 Mass. 734, 735 (2005). In determining whether to extend an order, a judge considers, among

other factors, the basis for the initial order, "the defendant's violations of protective orders, ongoing child custody or other litigation that is likely to engender hostility, the parties' demeanor in court, and the likelihood that the parties will encounter each other during the course of their usual activities" Iamele, supra at 740. No single factor is determinative, and the judge must consider the totality of the circumstances of the parties' relationship. Id. Where physical abuse triggers the initial order, a judge may extend the order "because the damage resulting from that physical harm affects the victim even when further physical attack is not reasonably imminent." Callahan v. Callahan, 85 Mass. App. Ct. 369, 374 (2014). See Vittone v. Clairmont, 64 Mass. App. Ct. 479, 489 (2005) ("some wounds may be so traumatic that the passage of time alone does not mitigate the victim's fear of the perpetrator"). "Faced with an extension request in such a circumstance, the judge must make a discerning appraisal of the continued need for an abuse prevention order to protect the plaintiff from the impact of the violence already inflicted" (quotation and citation omitted). S.V. v. R.V., 94 Mass. App. Ct. 811, 813 (2019).

The defendant argues that the judge abused her discretion by failing to consider the totality of the circumstances in her decision to extend the order. We disagree. The judge

considered the findings from the first extension hearing in 2017, including that "a very serious incident" occurred in December 2016. The judge also considered whether the defendant had violated the 209A order. The judge credited the plaintiff's testimony that she continued to be in fear of the defendant and the judge found that the plaintiff's fear was "legitimate." See Ginsberg v. Blacker, 67 Mass. App. Ct. 139, 140 n.3 (2006) ("We accord the credibility determinations of the judge who heard the testimony of the parties . . . [and] observed their demeanor . . . the utmost deference" [quotation and citations omitted]). The judge did not abuse her discretion nor make a clear error of judgment in determining that the plaintiff remained reasonably in fear of the defendant. L.L., 470 Mass. at 185 n.27 (no "clear error of judgment" where judge properly considered relevant factors in decision). The judge also considered that litigation between the parties was close to being resolved but was ongoing and that the parties had to interact regarding the children. Contrary to the defendant's assertion, the judge properly weighed "the totality of the conditions that exist[ed] at the time the plaintiff [sought] the extension viewed in light of the initial abuse prevention order" Iamele, 444 Mass. at 741. The judge reasonably concluded there was a continuing need for an abuse prevention order.

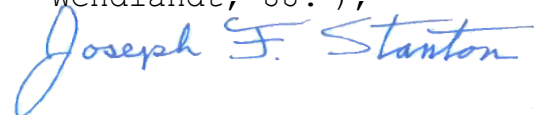
The defendant also argues that the judge abused her discretion in extending the order because there was insufficient evidence to support the order. Specifically, the defendant argues that the only "new" evidence presented by the plaintiff justifying her continued fear of the defendant is a June 2018 e-mail from the defendant that the plaintiff subjectively perceived as a "psychological threat." This e-mail was a violation of the 209A order.¹ The judge was concerned about the violation even though the defendant "may not have thought it was a violation." The judge, however, did not extend the abuse prevention order only because of the e-mail. As detailed above, the judge also relied on ample additional evidence including the seriousness of the initial physical altercations, the plaintiff's reasonable ongoing fear of the defendant, the parties' ongoing litigation, and the parties' need to interact about the children. Where the initial order was granted based on a finding of physical abuse, there did not need to be a subsequent incident of physical abuse or even "an objectively

¹ The ex parte order stated that the defendant may contact the plaintiff by "phone only." The January 13, 2017 order allowed the defendant to contact the plaintiff "by text, e-mail, and phone" regarding family issues. An April 27, 2017 modification amended the earlier order "to permit [e-mail] communication only about the children." The June 26 modification further permitted "[e-mail]/text communication regarding [the] child[ren] in accordance with a stipulation dated 6/26/17." The record does not reveal that the 209A order in effect in June 2018 permitted contact by any means regarding issues unrelated to the children.

reasonable fear of imminent serious physical harm" (emphasis added) to warrant an extension. Callahan, 85 Mass. App. Ct. at 374. See G. L. c. 209A, § 3 ("The fact that abuse has not occurred during the pendency of an order shall not, in itself, constitute sufficient ground for denying or failing to extend the order"). Having considered the totality of the circumstances, the judge did not abuse her discretion in concluding there was a continuing need for an abuse prevention order and granting the extension. See Iamele, 444 Mass. at 740; Callahan, supra.

Order dated August 20, 2018,
affirmed.

By the Court (Agnes, Shin &
Wendlandt, JJ.²),



Clerk

Entered: August 23, 2019.

² The panelists are listed in order of seniority.